

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

MICHAEL R. AND SUSAN C. CLARK,

No. C 11-0471 RS

Plaintiffs,

v.

**ORDER CONTINUING MOTION FOR
SUMMARY JUDGMENT PURSUANT
TO RULE 56(d)**

UNITED STATES OF AMERICA,

Defendant.

Plaintiffs Michael and Susan Clark brought this action seeking a refund of approximately \$1 million they paid in federal income taxes, plus interest. The parties' dispute arises from a transaction in which the Clarks transferred four "floating rate notes" ("FRNs") to Optech Limited, and received approximately \$7 million dollars in return. The Clarks contend the transaction was a loan, and that the FRNs were transferred to Optech merely as collateral. The Internal Revenue Service determined that the transaction legally constituted a sale of the FRNs from the Clarks to Optech, giving rise to a taxable capital gain. The government now seeks summary judgment that the transaction was in fact a sale, and that the Clarks' alternative claims of having suffered a theft loss and having an entitlement to acquire Qualified Replacement Property to defer recognition of a capital gain are without merit.

1 The Clarks have filed opposition to the motion, arguing that determining the legal nature and
2 effect of the transaction would require resolution of numerous disputed issues of fact, even on the
3 present record.¹ The Clarks also claim, though, that at a minimum they should be allowed to
4 complete discovery before the merits of this motion are considered.

5 Rule 56(d) of the Federal Rules of Civil Procedure permits denial or continuance of a motion
6 for summary judgment, “[i]f a nonmovant shows by affidavit or declaration that, for specified
7 reasons, it cannot present facts essential to justify its opposition.” A party requesting a Rule 56(d)
8 continuance bears the burden setting forth in affidavit form the specific facts he hopes to elicit from
9 further discovery; and of demonstrating that the facts sought exist, and that the sought-after facts are
10 essential to oppose summary judgment. *Family Home & Fin. Ctr., Inc. v. Fed. Home Loan Mortg.*
11 *Corp.*, 525 F.3d 822, 827 (9th Cir.2008); Fed.R.Civ.P. 56(d); see also *Tatum v. City & Cnty. of San*
12 *Francisco*, 441 F.3d 1090, 1100 (9th Cir.2006); *Chance v. Pac-Tel Teletrac Inc.*, 242 F.3d 1151,
13 1161 n. 6 (9th Cir.2001). Failing to meet this burden “is grounds for the denial” of a Rule 56(d)
14 motion. *Pfingston v. Ronan Eng. Co.*, 284 F.3d 999, 1005 (9th Cir.2002).

15 Here, the Clarks have offered woefully few specifics as to what facts remain to be
16 discovered or how they would be material to the analysis. Nevertheless, given that discovery is
17 ongoing and set to close on September 27, 2012, and in light of the fact-intensive nature of
18 determinations as to whether a transaction is a loan or a sale, and other issues in this case, the
19 hearing presently set for July 26, 2012 will be continued to November 8, 2012, at 1:30 p.m. No
20 later than October 18, 2012, the Clarks may file a supplemental opposition brief (not to exceed 15
21 pages) and any supporting declarations. The government may file a supplemental reply brief (also
22 not to exceed 15 pages) and any declarations no later than October 25, 2012.

23 The Clarks are cautioned that any factual assertions in their supplemental opposition must be
24 appropriately supported with citations to the record. They are further advised that simply because a
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26 ¹ The Clarks fail to provide evidentiary citations, however, for any of the assertions in their
27 “Statement of Facts.” Additionally, while they repeatedly insist that they never authorized Optech
28 to resell the FRNs, they fail to address the government’s arguments that they expressly granted such
authority in the transaction documents they executed.

1 particular legal question involves factual matters, or even application of a multi-factor “test,” entry
2 of summary judgment is not automatically precluded. “Where the record taken as a whole could not
3 lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’”
4 *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986).

5
6 IT IS SO ORDERED.

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8 Dated: July 23, 2012


RICHARD SEEBORG
UNITED STATES DISTRICT JUDGE